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NO. 82-26

in the

Supreme Court

of the

United States

October Term, 1982

THE FIRST STATE BANK OF MIAMI,
Petitioner

vs.

GOTHAM PROVISION COMPANY, INC. ET AL.,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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A LISTING COMPLYING WITH SUPREME COURT RULE 28 IS INCLUDED IN THE PETITION FOR CERTIORARI

REPLY

Respondents' brief in opposition raises several arguments for the first time. Since most of these arguments are not really responsive to the petition or the "certworthiness" of this case, no reply is necessary. Unfortunately, however, a reply could not be entirely avoided.

On pages 8-9 of their opposing brief, Respondents chose to make an egregious misstatement of the facts which must be clarified in order to keep this case in the proper focus. Respondents state:

> The loan balance remained at approximately $450,000.00 from the Spring of 1978 until early 1979. Late in February of the latter year, however, the bank began to apply Gotham's accounts receivable against the loan balance, without advancing any replacement funds to Gotham's operating account. Between February 28th and March 19, 1979, the bank applied more than $300,000 of Gotham's receivables. This reduced the amount owed to it from $450,000 to $112,324.00. (T. R. 1-63).

This statement, complete with its erroneous citation to the record, appears to be miscopied from a similar misstatement in the *amicus* brief filed by the U.S.D.A. before the Fifth Circuit. (See *Amicus* Brief at 7). If this statement were remotely correct, it is highly unlikely the Bank would be pursuing an appeal all the way to this Court.

Not only does this statement ignore the day-to-day nature of the Bank's advances, but the record reveals that precisely the opposite situation is true. According to the expert witness, *called by these cattle sellers,* the Bank advanced over $751,000 during the same period Respondents now claim the Bank was not advancing funds. (Sept. 7, TR. 211).

Throughout this case, there has been no question that the Bank acted in good faith and in the ordinary course of business. The Bank's arrangement with Gotham was endorsed and expected under the amended Act. The Bank's participation could do nothing but help cattle sellers. The Bank did not refuse to advance funds, it did not seize the packer's assets, it did not force the packer into bankruptcy. Instead, it continued advancing funds to the packer through and beyond bankruptcy.

Just prior to bankruptcy, the Bank advanced to the packer-trustee nearly three times more than these cattle sellers total claims. There is no dispute that the packer, as trustee, should have used these funds to pay the cattle sellers. The very purpose of the Bank's arrangement with Gotham was to provide immediate cash for the payment of these bills on a continuing basis. The question this Court must answer is whether the Bank, having already given the trustee the funds to pay its bills, can be held liable for the trustee's failure to properly apply those funds.

Respectfully submitted

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